IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GERALD J. KLEIN, on behalf of himself and all similarly situated; Plaintiff, vs. TD AMERITRADE HOLDING CORPORATION, TD AMERITRADE, INC., and FREDRIC TOMCZYK, Defendants.	**8:14CV396** **MEMORANDUM AND ORDER**

This matter is before the court on the defendants' motion in limine to exclude the testimony of the plaintiff's experts Haim Bodek and Shane Corwin under *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 589 (1993), Filing No. 195. This is a purported class action alleging wrongdoing in connection with stock trades. In this action, the lead plaintiff[1] alleges violations of federal securities laws in TD Ameritrade's alleged failure to route its clients' equity orders for "best execution."

I. BACKGROUND

The defendants seek an order precluding consideration of the opinions of plaintiff's experts Haim Bodek, a securities consultant and former trader, and Shane Corwin, a finance professor, in connection with the defendants' pending motion for class certification, and barring the experts from testifying at the class certification hearing which is presently scheduled for March 27, 2018, before United States Magistrate Judge Susan Bazis.

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[1] *See* Filing No. 27 (appointing lead plaintiff and lead counsel)

Haim Bodek was retained to perform a data analysis of the trading history of two representative TD Ameritrade clients and to identify issues of economic harm. He will testify to a method of proving economic loss by common proof that does not vary by class member. He has created an algorithm and refined it to provide a method to be applied across the class. Professor Shane Corwin was retained to opine on whether Mr. Bodek's analysis is capable of identifying economic harm arising from a failure of best execution in line with academic and regulatory standards.[2]

Defendants argue that Bodek's methodology is novel and untested and fails to meet the "peer review" and "general acceptance" factors set forth by the Supreme Court in *Daubert*. They next argue that Professor Corwin's opinions should be excluded because he did not conduct his own analyses, his opinions are duplicative, and he is nothing more than a "mouthpiece" for Bodek. Further, the defendants attempt to exclude any opinions proffered by the two experts that go to the merits of the plaintiff's case—that is, the best execution issue. They also argue that Corwin offers improper legal opinions.

In opposition, the plaintiff argues that Bodek uses industry-standard metrics that have been used by the Securities Exchange Commission to identify economic harm, the metrics are simple equations with discrete data as input, are generally accepted in the industry, and have been used in peer reviewed papers. Further, he argues that Bodek uses an order book analysis to analyze depth of available liquidity and has proposed exclusion of certain categories to avoid any doubt concerning the harm attributable to defendant TD Ameritrade. The plaintiff also disputes the defendants' argument that Bodek has "changed" his methodology in his rebuttal report, stating that Bodek employed a limited order book analysis with certain exclusions in his initial report and expanded on the analysis in his rebuttal report.

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[2] Professor Corwin has provided similar expert testimony in *In re NYSE Specialists Sec. Litig.*, 260 F.R.D. 55, 69 (S.D.N.Y. 2009), a case involving algorithmic analysis to identify economic loss in the context of a best execution case.

II. LAW

Federal Rule of Evidence 702 governs the admissibility of expert testimony and requires that: (1) the evidence must be based on scientific, technical or other specialized knowledge that is useful to the finder of fact in deciding the ultimate issue of fact; (2) the witness must have sufficient expertise to assist the trier of fact; and (3) the evidence must be reliable or trustworthy. *Kudabeck v. Kroger Co.*, 338 F.3d 856, 859 (8th Cir. 2003). Expert testimony assists the trier of fact when it provides information beyond the common knowledge of the trier of fact. *Id*. at 860. When faced with a proffer of expert testimony, trial judges are charged with the "gatekeeping" responsibility of ensuring that all expert evidence admitted is both relevant and reliable. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999); *Daubert v. Merrell Dow Pharms*., 509 U.S. 579, 589 (1993); *United States v. Wintermute*, 443 F.3d 993, 1000 (8th Cir. 2006). A trial court is given wide latitude in determining whether an expert's testimony is reliable. *See Kumho Tire,* 526 U.S. at 152.

Proposed expert testimony must meet three prerequisites in order to be admitted under Rule 702: First, evidence based on scientific, technical, or other specialized knowledge must be useful to the finder of fact in deciding the ultimate issue of fact; second, the proposed witness must be qualified to assist the finder of fact; and third, the proposed evidence must be reliable or trustworthy in an evidentiary sense. *Lauzon v.*

Senco Prods., Inc., 270 F.3d 681, 686 (8th Cir. 2001). Expert testimony assists the trier of fact when it provides information beyond the common knowledge of the trier of fact. *Kudabeck,* 338 F.3d at 860. The district court's gatekeeper function applies to all expert testimony, not just testimony based in science. *Id.*

Under *Daubert*, district courts apply a number of nonexclusive factors in performing this role. *Lauzon*, 270 F.3d at 686-87. These are: whether the theory or technique can be and has been tested; whether the theory or technique has been subjected to peer review and publication; the known or potential rate of error; whether the theory has been generally accepted; whether the expertise was developed for litigation or naturally flowed from the expert's research; whether the proposed expert ruled out other alternative explanations; and whether the proposed expert sufficiently connected the proposed testimony with the facts of the case. *Id.* at 686-87. "This evidentiary inquiry is meant to be flexible and fact specific, and a court should use, adapt, or reject *Daubert* factors as the particular case demands." *Unrein v. Timesavers, Inc.*, 394 F.3d 1008, 1011 (8th Cir. 2005).

The proponent of expert testimony bears the burden of providing admissibility by a preponderance of the evidence. *Lauzon*, 270 F.3d at 686. When the application of a scientific methodology is challenged as unreliable under *Daubert* and the methodology itself is otherwise sufficiently reliable, outright exclusion of the evidence is "warranted only if the methodology was so altered by a deficient application as to skew the methodology itself." *United States v. Gipson*, 383 F.3d 689, 697 (8th Cir. 2004) (brackets omitted) (quoting *United States v. Martinez*, 3 F.3d 1191, 1198 (8th Cir. 1993)).

In the Eighth Circuit, "cases are legion that, correctly under *Daubert*, call for the liberal admission of expert testimony." *Johnson v. Mead Johnson & Co., LLC*, 754 F. 3d 557, 562 (8th Cir. 2014). District courts are admonished "not to weigh or assess the correctness of competing expert opinions." *Id.* Rather, expert testimony should generally "be tested by the adversary process with competing expert testimony and cross-examination, rather than excluded by the court at the outset." *Id.* Any doubts regarding expert testimony "should generally be resolved in favor of admissibility." *United States v. Finch*, 630 F.3d 1057, 1062 (8th Cir. 2011) (quoting *Sphere Drake Ins. PLC v. Trisko*, 226 F.3d 951, 954 (8th Cir. 2000)).

Courts apply the more lenient "focused *Daubert*" inquiry at the class certification stage. *In re Zurn Pex Plumbing Prod. Liab. Litig*., 644 F.3d 604, 612 (8th Cir. 2011). "Expert disputes 'concerning the factual setting of the case' should be resolved at the class certification stage only to the extent 'necessary to determine the nature of the evidence that would be sufficient, if the plaintiff's general allegations were true, to make out a prima facie case for the class.'" *Id.* at 611 (quoting *Blades v. Monsanto Co.,* 400 F.3d 562, 567 (8th Cir. 2005). The district court is not required "to decide conclusively at the class certification stage what evidence will ultimately be admissible at trial." *Id.*

The court must determine if "questions of law or fact common to class members predominate over any questions affecting only individual members [and if] a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); *In re Zurn Pex*, 644 F.3d at 613; *see also Smith v. ConocoPhillips Pipe Line Co.*, 801 F.3d 921, 925 n.2 (8th Cir. 2015) (declining to revisit the *Zurn Pex* holding that only a focused *Daubert* analysis is required at the class certification stage). The district court must determine "'whether, if [the plaintiff's] basic allegations were true, common evidence could suffice, given the factual setting of the case, to show classwide injury.'" *Zurn Pex,* 644 F.3d at 612 (quoting *Blades,* 400 F.3d at 575). Under Fed. R. Civ. P. 23(b)(3), damages must be susceptible of measurement across the entire class. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). At the class certification stage, it is not necessary that class damages be calculated to a mathematical certainty, but "any model supporting a 'plaintiff's damages case must be consistent with its liability case.'" *Id.*; *see Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010) (noting that "[a]t class certification, plaintiff must present a likely method for determining class damages, though it is not necessary to show that [this] method will work with certainty at this time.").

Class certification "is inherently tentative." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n. 11 (1978). A district court's decision on admissibility of expert testimony [or class certification] may "require revisiting upon completion of full discovery," *Blades*, 400 F.3d at 567. An exhaustive and conclusive *Daubert* inquiry before the completion of merits discovery cannot be reconciled with the inherently preliminary nature of pretrial evidentiary and class certification rulings. *Zurn Pex,* 644 F.3d at 613.

The main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony. *In re Zurn Pex*, 644 F.3d at 613. That interest is not implicated at the class certification stage where the judge is the decision maker. *Id.* "'[T]here is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.'" *Id.* (quoting *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005)). The usual concerns of the *Daubert* rule—keeping unreliable expert testimony from the jury—are not present in the class certification setting. *In re Zurn Pex*, 644 F.3d at 613. "Expert opinions may have to adapt as such gaps are filled by merits discovery, and the district court will be able to reexamine its evidentiary rulings." *Id.*

The court must determine that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim. *Comcast*, 133 S. Ct. at 1433; *Blades,* 400 F.3d at 567 ("The preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case.")

III. DISCUSSION

The court finds that the defendants' motion in limine to exclude the reports and testimony of the plaintiff's experts Bodek and Corwin should be denied at this time. Both experts appear to be qualified to testify. The testimony and opinions are based on methodology that appears reliable relevant—similar methods have been used in other securities cases. *See, e.g., In re NYSE Specialists Sec. Litig.*, 260 F.R.D. 55, 66 (S.D.N.Y. 2009) ("In connection with the SEC's investigations of the Specialist Firms, the NYSE designed and created a computer algorithm to identify specific stock transactions where specialists had traded ahead of public orders, interpositioned themselves between public orders, and failed to execute public limit orders by trading for their own personal accounts.").

The defendants have not shown that the experts' methods are so lacking in reliability as to require exclusion at this point in the litigation. The defendants' challenge goes more to the weight of the experts' testimony than to its admissibility. The court finds the reports and testimony may be admitted for the limited purpose of determining whether the requirements of Rule 23 have been met. The court should be allowed to weigh the credibility of the experts on Rule 23 issues.

Of course, the defendants' expert disagrees with the plaintiff's experts' methods and conclusions. That, however, is not a reason to preclude the testimony. At his stage of the case, the experts' testimony and opinions will not be presented to a jury, but to a judge who is capable of weighing the evidence and ignoring any irrelevant or duplicative testimony or testimony that amounts to an improper legal opinion.

The defendants' argument that some of the plaintiffs' experts' testimony goes to the merits of the dispute rather than to the issue of class certification is similarly unavailing. Class certification issues are often intertwined with merits issues. Touching on the merits is not a reason to exclude the testimony. Again, the court is capable of compartmentalizing the evidence and evaluating the evidence in context.

The court also rejects the defendants' contention that the evidence should be excluded because Bodek allegedly altered the methods and conclusions in his original report in response to Dr. Kleidon's report. The parties are permitted, actually required, to supplement their expert reports. To the extent the defendants wish to respond to any purportedly "new" conclusions, they are free to seek leave to do so.

Further, the court rejects the defendants' contention that Corwin's testimony should be excluded because he depends, to some extent, on Bodek's finding. An expert may extrapolate from data supplied by other experts. *Larson v. Kempker*, 414

F.3d 936, 941 (8th Cir. 2005). The defendant's criticisms of the experts' testimony are properly the subject of cross-examination. Accordingly,

IT IS ORDERED that the defendants' motion in limine to exclude the opinions and testimony of plaintiff's experts Haim Bodek and Shane Corwin (Filing No. 195) is denied, without prejudice to reassertion as merits discovery progresses.

Dated this 7th day of March, 2018.

BY THE COURT:

s/ Joseph F. Bataillon
Senior United States District Judge